Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

6 June 2013*

(Commercial policy — Regulation (EC) No 1225/2009 — Articles 13 and 14 — Imports of products originating in China — Anti-dumping duties — Circumvention — Re-consignment of goods via Malaysia — Implementing Regulation (EU) No 723/2011 — Registration of imports — Recovery of anti-dumping duties — Retroactivity)

In Case C-667/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Administrativen sad Varna (Bulgaria), made by decision of 8 December 2011, received at the Court on 27 December 2011, in the proceedings

Paltrade EOOD

v

Nachalnik na Mitnicheski punkt – Pristanishte Varna pri Mitnitsa Varna,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, G. Arestis (Rapporteur), J.-C. Bonichot, A. Arabadjiev and J. L. da Cruz Vilaça, Judges,

Advocate General: Y. Bot,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 10 January 2013,

after considering the observations submitted on behalf of:

— the Nachalnik na Mitnicheski punkt – Pristanishte Varna pri Mitnitsa Varna, by S. Valkova, S. Yordanova, V. Konova and M. Yanev,

— the Bulgarian Government, by T. Ivanov and Y. Atanasov, acting as Agents,

— the Spanish Government, by A. Rubio González, acting as Agent,

— the Italian Government, by G. Palmieri, acting as Agent, and by P. Gentili, avvocato dello Stato,

— Hungary, by K. Szíjjártó, acting as Agent,

* Language of the case: Bulgarian.

— the European Commission, by M. França, D. Stefanov and A. Stobiecka-Kuik, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the conditions under which anti-dumping duties may be retroactively levied under Council Implementing Regulation (EU) No 723/2011 of 18 July 2011 extending the definitive anti-dumping duty imposed by Regulation (EC) No 91/2009 on imports of certain iron or steel fasteners originating in the People's Republic of China to imports of certain iron or steel fasteners consigned from Malaysia, whether declared as originating in Malaysia or not (OJ 2011 L 194, p. 6, 'the implementing Regulation'), following an anti-circumvention investigation within the meaning of Article 13 of Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community (OJ 2009 L 343, p. 51, 'the basic Regulation').

2 The request has been made in proceedings between Paltrade EOOD ('Paltrade'), on the one hand, and the Nachalnik na Mitnicheski punkt – Pristanishte Varna (head of the customs office – port of Varna) under the responsibility of the Nachalnik Mitnitsa Varna (director of the Varna customs authority) ('the customs authority'), on the other, concerning a decision ordering Paltrade to pay additional anti-dumping duties.

Legal context

3 According to recital 19 of the preamble to the basic Regulation:

'… Given the failure of the multilateral negotiations so far and pending the outcome of the referral to the WTO Anti-Dumping Committee, it is necessary that Community legislation should contain provisions to deal with practices, including mere assembly of goods in the Community or a third country, which have as their main aim the circumvention of anti-dumping measures.'

4 Article 13 of the basic Regulation, headed 'Circumvention', provides:

'1. Anti-dumping duties imposed pursuant to this Regulation may be extended to imports from third countries, of the like product, whether slightly modified or not, or to imports of the slightly modified like product from the country subject to measures, or parts thereof, when circumvention of the measures in force is taking place. … Circumvention shall be defined as a change in the pattern of trade between third countries and the Community or between individual companies in the country subject to measures and the Community, which stems from a practice, process or work for which there is insufficient due cause or economic justification other than the imposition of the duty, and where there is evidence of injury or that the remedial effects of the duty are being undermined in terms of the prices and/or quantities of the like product, and where there is evidence of dumping in relation to the normal values previously established for the like product, if necessary in accordance with the provisions of Article 2.

…

3. Investigations shall be initiated pursuant to this Article on the initiative of the Commission or at the request of a Member State or any interested party on the basis of sufficient evidence regarding the factors set out in paragraph 1. Investigations shall be initiated … by Commission Regulation which

may also instruct the customs authorities to make imports subject to registration in accordance with Article 14(5) or to request guarantees. Investigations shall be carried out by the Commission, which may be assisted by customs authorities and shall be concluded within nine months. When the facts as finally ascertained justify the extension of measures, this shall be done by the Council, acting on a proposal submitted by the Commission, after consultation of the Advisory Committee. … The extension shall take effect from the date on which registration was imposed pursuant to Article 14(5) or on which guarantees were requested. …'

5 Article 14 of the basic Regulation, entitled 'General provisions', provides:

'…

5. The Commission may, after consultation of the Advisory Committee, direct the customs authorities to take the appropriate steps to register imports, so that measures may subsequently be applied against those imports from the date of such registration. Imports may be made subject to registration following a request from the Community industry which contains sufficient evidence to justify such action. Registration shall be introduced by regulation which shall specify the purpose of the action and, if appropriate, the estimated amount of possible future liability. Imports shall not be made subject to registration for a period longer than nine months.'

6 Council Regulation (EC) No 91/2009 of 26 January 2009 imposed a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China (OJ 2009 L 29, p. 1).

7 Under Article 1(2) of that regulation, the rate of the definitive anti-dumping duty for all companies other than those listed in the table appearing in that provision is 85%, under the TARIC additional code A999.

8 Subsequently, by Commission Regulation (EU) No 966/2010 of 27 October 2010, the Commission initiated an investigation concerning the possible circumvention of anti-dumping measures imposed by Regulation No 91/2009 by imports of certain iron or steel fasteners consigned from Malaysia, whether declared as originating in Malaysia or not, and making such imports subject to registration (OJ 2010 L 282, p. 29).

9 Recital 18 in the preamble to Regulation No 966/2010 is worded as follows:

'Pursuant to Article 14(5) of the basic Regulation, imports of the product under investigation should be made subject to registration in order to ensure that, should the investigation result in findings of circumvention, anti-dumping duties of an appropriate amount can be levied retroactively from the date of registration of such imports consigned from Malaysia.'

10 Article 2 of that regulation made those imports subject to registration.

11 The implementing Regulation extends the definitive anti-dumping duty established by Regulation No 91/2009 to imports of certain iron or steel fasteners consigned from Malaysia, whether declared as originating in Malaysia or not. Article 1 of the implementing Regulation thus provides:

'1. The definitive anti-dumping duty applicable to 'all other companies' imposed by Article 1(2) of Regulation (EC) No 91/2009 on imports of [the products concerned] originating in the People's Republic of China, is hereby extended to imports of [the products concerned] consigned from Malaysia, whether declared as originating in Malaysia or not, currently falling within CN codes ex 7318 12 90, ex 7318 14 91 … (TARIC codes … 7318 12 90 91, … 7318 14 91 91) ...

…

3. The duty extended by paragraph 1 of this Article shall be collected on imports consigned from Malaysia, whether declared as originating in Malaysia or not, registered in accordance with Article 2 of Regulation (EU) No 966/2010 and Articles 13(3) and 14(5) of Regulation (EC) No 1225/2009, with the exception of those produced by the companies listed in paragraph 1.

...'

12 Under Article 78 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1), as amended by Regulation (EC) No 1791/2006 of the European Parliament and of the Council of 20 November 2006 (OJ 2000 L 363, p. 1), ('the Customs Code'):

'1. The customs authorities may, on their own initiative or at the request of the declarant, amend the declaration after release of the goods.

…

3. Where revision of the declaration or post-clearance examination indicates that the provisions governing the customs procedure concerned have been applied on the basis of incorrect or incomplete information, the customs authorities shall, in accordance with any provisions laid down, take the measures necessary to regularise the situation, taking account of the new information available to them.'

13 Article 217(1)(a) of the Customs Code provides:

'1. Each and every amount of import duty or export duty resulting from a customs debt, hereinafter called "amount of duty", shall be calculated by the customs authorities as soon as they have the necessary particulars, and entered by those authorities in the accounting records or on any other equivalent medium (entry in the accounts).

The first subparagraph shall not apply:

(a) where a provisional anti-dumping or countervailing duty has been introduced ...'

14 Article 2 of Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1987 L 256, p. 1), as amended by Council Regulation (EU) No 555/2011 of 6 June 2011 (OJ 2011 L 150, p. 3), provides:

'An Integrated Tariff of the European Communities, hereinafter referred to as the "TARIC", which meets the requirements of the Common Customs Tariff, external trade statistics, the commercial, agricultural and other Community policies concerning the importation or exportation of goods, shall be established by the Commission.

…'

The dispute in the main proceedings and the questions referred for a preliminary ruling

15 On 31 January 2011 Paltrade, whose registered office is in Varna, made a customs declaration by means of a single administrative document No 11BG002005H0004290 ('the single administrative document') clearing for simultaneous release for free circulation and home use the following goods: 2 528 800 wood screws and 634 a0; 000 self-tapping screws, which were consigned from Malaysia and were among the products on which the anti-dumping duty was to be imposed under the implementing

Regulation. The customs duties and value added tax owed were taken into account on 31 January 2011, that is to say, before the anti-dumping duty had been definitively extended to the importation of those goods.

16 However, after the entry into force, on 27 July 2011, of the implementing Regulation, adopted on the basis of Article 78 of the Customs Code, subsequent to the release of the goods in question, the customs authority carried out an *ex post facto* review of the declaration in order to verify the accuracy of the data therein. Following the review of the single administrative document and of the documents attached to it, the custom authority found that the single administrative document had been registered during the period of investigation conducted under Regulation No 966/2010. Consequently, the customs authority carried out a revision of the data set out in that document.

17 The Bulgarian customs authorities did not adopt any particular measures with a view to the registration of imports from Malaysia, nor register the TARIC additional code – A999 set out in Article 1(2) of Regulation No 91/2009. Rather, they applied the usual registration procedure of customs declarations made in accordance with the single administrative document model, in the Bulgarian integrated customs information system (Balgarska integrirana mitnicheska informatsionna sistema, 'the BIMIS system').

18 By decision No 9300-843 of 10 August 2011, the customs authority levied the additional amount of BGN 14 623,75 of anti-dumping duties and BGN 2 924,76 of value added tax on Paltrade. The latter brought an action against that decision before the Administrativen sad Varna.

19 In those circumstances, the Administrativen sad Varna decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Is the retroactive levy of an anti-dumping duty pursuant to Article 1 of [the implementing Regulation] permissible, without a customs registration – except for the customs registration of the single administrative document in the BIMIS system – taking place with the registration of the TARIC additional code which is mentioned in Article 1 of Regulation No 91/2009?

2. What is, in accordance with recital 18 of Regulation No 966/2010, the appropriate amount for the retroactive levy of an anti-dumping duty pursuant to [the implementing Regulation]?'

Consideration of the questions referred

20 By those two questions, which it is appropriate to consider together, the national court asks, in essence, first, whether Article 14(5) of the basic Regulation, to which Article 2 of Regulation No 966/2010 refers, is to be interpreted as meaning that means of registration such as those at issue in the main proceedings are in accordance with that provision and suffice, therefore, for the retroactive levy of an anti-dumping duty pursuant to Article 1 of the implementing Regulation following an investigation finding circumvention of the definitive anti-dumping duties imposed by Regulation No 91/2009, and, secondly, as the case may be, what the amount of such an anti-dumping duty levied retroactively would be, pursuant to the implementing Regulation.

Observations submitted to the Court

21 The Bulgarian government and the customs authority take the view that it is not necessary to introduce a system of registration other than that of the registration of the single administrative document in the BIMIS, since the latter allows interconnection between information systems based on TARIC codes. According to those parties, the customs documents provided for by national and

European customs legislation for every type of destination and customs procedure are subject to automated processing by the BIMIS which allows the collection of information from the database of customs documents.

22 The Spanish and Italian governments, Hungary, and the Commission are also of the opinion that the relevant provisions of the basic Regulation, of Regulation No 966/2010, and of the implementing Regulation concerning the registration of the imports at issue do not require the creation of a specific registration system. Any national registration system should be considered sufficient if it enables the customs authorities to inspect the registered imports, at the time of the publication of the regulation establishing that the anti-dumping duties must be imposed on those registered imports, and the ability to levy and notify those duties.

23 The Commission adds that the current system of registration of single administrative documents in the BIMIS is more than sufficient to achieve the objectives of Article 14(5) of the basic Regulation.

24 The defendant in the main proceedings, the Commission, and all the governments which submitted observations maintain that the implementing Regulation expressly indicates that, for the Malaysian companies covered by the definitive anti-dumping duty laid down by Regulation No 91/2009, it is necessary to apply the rate of that anti-dumping duty, fixed at 85%.

Findings of the Court

25 In accordance with Article 13(1) of the basic Regulation, anti-dumping duties imposed pursuant to that regulation may be extended to imports from third countries of like products, or parts thereof, when circumvention of the measures in force is taking place. According to Article 13(3), investigations are to be initiated by a Commission Regulation which may instruct the customs authorities to make imports subject to registration in accordance with Article 14(5) of the basic Regulation.

26 In particular, it follows from Article 13(3) of the basic Regulation that, in the event of circumvention, the extension of the established definitive measures is to take effect from the date on which the registration was imposed pursuant to Article 14(5) of that regulation.

27 According to the latter provision, the Commission may direct the national customs authorities to take the appropriate steps to register imports, so that the measures extended to the products concerned may subsequently be applied against imports of those products from the date of their registration. The registration of the products concerned is to be introduced by regulation which specifies the purpose of the action and, if appropriate, the estimated amount of possible future liability. Imports are not to be made subject to registration for a period longer than nine months.

28 Accordingly, it must be pointed out that, according to the purpose and scheme of the basic Regulation, in particular recital 19 and Article 13, the sole purpose of a regulation extending an anti-dumping duty is to ensure the effectiveness of that duty and to prevent its circumvention. Consequently, a measure extending a definitive anti-dumping duty is merely ancillary to the initial act establishing that duty which protects the effective application of the definitive measures.

29 It follows that the obligation to register the imports concerned, in the specific context of a circumvention, is also aimed at ensuring the effectiveness of the extended definitive measures by making possible the retroactive application of duties and thereby avoiding a situation in which the definitive measures to be applied are deprived of their effectiveness. In that respect, since the Commission has directed the competent national authorities to take the appropriate steps to register the imports concerned in order to ensure the retroactive imposition of extended anti-dumping duties, those authorities are required to comply with that obligation.

30 In the main proceedings, Regulation No 91/2009 established the definitive anti-dumping duty on the products concerned originating in China. Subsequently, Regulation No 966/2010, by initiating an investigation concerning the possible circumvention of that measure, required - by means of Article 2 of that regulation, and on the basis of Articles 13(3) and 14(5) of the basic Regulation – the registration of imports of the products concerned consigned from Malaysia. Following the finding of circumvention, the implementing Regulation extended the definitive anti-dumping duty established by Regulation No 91/2009 to imports of the goods concerned consigned from Malaysia, whether declared as originating in Malaysia or not.

31 It follows from Article 2 of Regulation No 966/2010 that, in circumstances such as those in the main proceedings, the Member States are obliged to take certain appropriate implementing measures to register the imports concerned, pursuant to Article 13(3) and Article 14(5) of the basic Regulation.

32 However, in the absence of any information in the basic Regulation and in Regulation No 966/2010 on the manner in which the Member States must carry out the registration, it is for the Member States to establish the means of that registration in such a way as to ensure that the retroactive application of the extended anti-dumping duties is correctly carried out and the objective of that regulation is thereby achieved.

33 In that respect, it is apparent from the documents before the Court that the registration by the single administrative document in the BIMIS system in force satisfies the imposed obligation, since it leaves no doubt as to the identification of every import transaction of the products concerned subject to levy and allows the effective collection of all the available information in order to require an accurate retroactive levy of extended anti-dumping duties.

34 Therefore, a registration such as that at issue in the main proceedings satisfies the requirements of Article 14(5) of the basic Regulation.

35 Accordingly, the registration at issue satisfies the obligation imposed by the applicable provisions of the regulations in question.

36 As regards the rate of the anti-dumping duty levied retroactively pursuant to the implementing Regulation, it is clear from Article 1(1) of that regulation that the duty extended to imports of the goods concerned from Malaysia is the definitive anti-dumping duty applicable to ‘all other companies’ imposed by Article 1(2) of Regulation No 91/2009.

37 Under Article 1(2) of Regulation No 91/2009, the rate of the extended anti-dumping duty is 85%.

38 It follows from the foregoing that the answer to the questions referred is as follows:

— Article 14(5) of the basic Regulation, referred to in Article 2 of Regulation No 966/2010, must be interpreted as meaning that means of registration such as those at issue in the main proceedings are in accordance with that provision and suffice, therefore, for the retroactive levy of an anti-dumping duty pursuant to Article 1 of the implementing Regulation following an investigation finding circumvention of the definitive anti-dumping duties imposed by Regulation No 91/2009.

— In accordance with Article 1(2) of Regulation No 91/2009, the rate of the extended anti-dumping duty levied retroactively on goods imported prior to the entry into force of the implementing Regulation is 85% for ‘all other companies’.

Costs

39 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

Article 14(5) of Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community, referred to in Article 2 of Commission Regulation (EU) No 966/2010 of 27 October 2010 initiating an investigation concerning the possible circumvention of anti-dumping measures imposed by Council Regulation (EC) No 91/2009 on imports of certain iron or steel fasteners originating in the People's Republic of China by imports of certain iron or steel fasteners consigned from Malaysia, whether declared as originating in Malaysia or not, and making such imports subject to registration, must be interpreted as meaning that means of registration such as those at issue in the main proceedings are in accordance with that provision, and suffice, therefore, for the retroactive levy of an anti-dumping duty pursuant to Article 1 of Council Implementing Regulation (EU) No 723/2011 of 18 July 2011 extending the definitive anti-dumping duty imposed by Regulation (EC) No 91/2009 on imports of certain iron or steel fasteners originating in the People's Republic of China to imports of certain iron or steel fasteners consigned from Malaysia, whether declared as originating in Malaysia or not, following an investigation finding circumvention of the definitive anti-dumping duties imposed by Council Regulation (EC) No 91/2009 of 26 January 2009 imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China.

In accordance with Article 1(2) of Regulation No 91/2009, the rate of the extended anti-dumping duty levied retroactively on goods imported prior to the entry into force of Implementing Regulation No 723/2011 is 85% for 'all other companies'.

[Signatures]